SUPREME COURT U.S.
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No.

IN THE

Supreme Court of the United States

Randy Lee Hammitt, and
Sandra Marie Hammitt,
Petitioners
v.

United States of America,
Respondents

On Petition For Writ of Certiorari
To The Federal Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Do the Courts have the authority to evince Congress's intent to preempt any Tucker Act jurisdiction over a money claim that challenges the taking of property of innocent owners in an *in rem* forfeiture where Congress has not explicitly withdrawn the Tucker Act grant of jurisdiction to the Claims Court within the *in rem* statute?

PARTIES TO THE PROCEEDINGS

Randy Lee Hammitt, Petitioner
Sandra Marie Hammitt, Petitioner

United States of America, Respondent
Attorney for United States
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PETITION FOR WRIT OF CERTIORARI

Petitioners Randy Lee Hammitt and Sandra Marie Hammitt respectfully petition for a writ of ***certiorari*** to review the judgment of the Court of Appeals for the Federal Circuit affirming the judgment of the Court of Claims

STATEMENT OF BASIS OF JURISDICTION

On April 7, 2005 Petitioners timely filed an action for damages in the United States Court of Federal Claims against the United States pursuant to Title 28 U.S.C. § 1346 (a) (2) and § 1491 (a). The United States Court of Federal Claims dismissed the action on December 20, 2005 for alleged lack of jurisdiction.

On February 21, 2006 Petitioners filed a timely notice of appeal in the U.S. Court of Appeals for the Federal Circuit. On December 26, 2006 said Court affirmed the dismissal of Petitioners action filed in the United States Court of Federal Claims.

Petitioners filed a timely petition for re-hearing and re-hearing en banc. On March 1, 2007 the U.S. Court of Appeals for the Federal Circuit denied the re-hearing and re-hearing ***en banc***, and issued a mandate on March 8, 2007.

The jurisdiction of the United States Supreme Court is invoked pursuant to Title 28 U.S.C. § 1254 (1) from the final judgment rendered by The United States Court of Appeals for the Federal Circuit.

The Honorable Supreme Court of the United States is the proper court with jurisdiction upon the timely filing of the Petition for Writ of Certiorari to The United States Supreme Court for the Federal Circuit.

CONSTITUTIONAL AMENDMENT & STATUTE INVOLVED

Fifth Article in Amendment of the Constitution of the United States of America, Title 28 U.S.C. § 1346 (a)(2), Title 28 U.S.C. § 1491 (a)(1), Title 18 U.S.C.§ 983.

STATEMENT OF THE CASE

The Proceedings Below

Petitioners filed a complaint/action on April 7, 2005 in The United States Court of Federal Claims under Title 28 U.S.C. § 1346 (a) (2), against the United States of America, based upon the Fifth Article in Amendment of the Constitution of the United States of America, the taking clause. The United States Court of Federal Claims is the proper jurisdiction and the exclusive remedy to render judgment against the United States founded upon the Constitution...when the claim exceeds Ten Thousand Dollars in value, pursuant to Title 28 U.S.C. § 1491.

Oral arguments were held on December 13, 2005 in which the Court of Claims subsequently dismissed

Petitioners filed a timely appeal on February 21, 2006. On December 26, 2006 the Court of Appeals for the Federal Circuit affirmed the dismissal by the Court of Claims stating that Petitioners only path of relief was in the United States district court.

Petitioners filed a timely petition for re-hearing and re-hearing en banc, which was subsequently denied on March 1, 2007.

Statement of the Facts

On August 9, 1999 Petitioners entered into a twenty-five (25) year lease agreement with Phillip Mark Vaughan to lease real property with an exclusive first option to purchase. The real property is located at 555 Whitethorn Drive, Gastonia, North Carolina.

On January 11, 2001, without Petitioners' knowledge, Phillip Mark Vaughan was indicted by a grand jury for money laundering, subsequently found guilty and sentenced to seventeen years in prison.

On March 18, 2002 Petitioners attempted to enforce the first option to purchase the real property. Phillip Mark Vaughan refused to sell the real property to Petitioners. Petitioners did not realize and had no knowledge of the fact that Phillip Mark Vaughan agreed, by affidavit, to forfeit the property to the United States alleging that illegal proceeds were used to purchase the real property.

Therefore, the real property was allegedly subject to forfeiture to the United States.

Petitioners, not knowing at the time the existence of the affidavit or Mr. Vaughan's agreement to forfeit the property to the United States, Petitioners commenced an action for quiet title in the Superior Court of Gaston County, North Carolina on April 30, 2003.

While Petitioners quiet title action was pending, on May 30, 2003 the United States filed a complaint for forfeiture *in rem* in the United States District Court for the Western District of North Carolina pursuant to the general federal civil forfeiture statute, Title 18 U.S. C. § 983. On October 26, 2004 the United States was granted a judgment for forfeiture. All rights, title, and interest in the real property was vested in the United States government.

On March 11, 2005 the U.S. District Court ordered Petitioners to vacate the property, and on April 1, 2005 the U.S. Marshals served an order to vacate the real property. While Petitioners were out of town, the U.S. Marshals broke into the house, via the side door, containing all of Petitioners' personal property. The U.S. Marshals changed all the locks on the doors.

Petitioners were compelled to incur the expense of renting a hotel room in excess of thirty days. Eventually, Petitioners were allowed by the U.S. Marshals to remove all personal property. Petitioners were also compelled to incur another expense of renting a storage pod.

substantial improvements to the real property, placed UCC-1 liens against the real property, and filed the same in the Gaston County Registry. Petitioners lost all investments in the real property when the real property was taken and the liens were destroyed and became unenforceable by the actions of the United States government.

On April 7, 2005 Petitioners filed a complaint in the United States Court of Federal Claims for the taking and destruction of Petitioners interest, equitable and otherwise, in the real property based upon the just compensation clause of the Fifth Article in Amendment of the Constitution of the United States of America. The Court of Claim's jurisdiction was invoked pursuant to Title 28 U.S.C. § 1346 (a) (2), and since the claim exceeded Ten Thousand Dollars, the Court of Claims has exclusive jurisdiction, Title 28 U.S. § 1491 (a) (1).

The Court of Claims subsequently dismissed Petitioners complaint for alleged lack of subject matter jurisdiction. The Court of Claims conclusion is reassuring, but fails to remedy Petitioners' loss when the Court of Claims clearly has the authority. The court concluded, "We are mindful of the fact that the Hammitts have suffered a great personal and economic loss by reason of the illegal activity of their landlord, and through no fault of their own. None the less, this Court has no authority to remedy this loss".

The United States Court of Federal Claims concluded that Petitioners remedy was with the U.S. District Court. This conclusion was also affirmed by the United States Court of Appeals for the Federal Circuit.

Both courts concluded that Congress has explicitly withdrawn the remedy of the Tucker Act as to Petitioners. The Court of Claims is "assuming that Congress intended to preempt the Court of Claims Tucker Act jurisdiction over Plaintiffs' taking claim" (page 5, par. 4 of opinion in Appendix).

The United States Court of Appeals for the Federal Circuit's opinion also concluded that Petitioners claim is preempted by Congressional statute. After requesting a re-hearing and re-hearing *en banc* by the full court, subsequently denied, the court concluded that a Tucker Act remedy is not available to Petitioners, and Congress "intended to preempt jurisdiction on the Court of Claims".

REASONS FOR GRANTING THE WRIT

I. Both the United States Court of Federal Claims and the United States Court of Appeals for the Federal Circuit's decisions concluded that Petitioners' only remedy was in the United States district court. Said courts also concluded, that the Tucker Act jurisdiction was preempted by Congress.

The conclusion reached by both courts has decided an important federal question in a way that conflicts with relevant decisions of this Court. Both courts have assumed a legislative position and "read into a law" something that is not there.

The facts stated in this petition clearly show that Petitioners' had a leasehold interest, lien interest, and investment interest in the real property.

This Court has ruled that Petitioners' leasehold, liens, and investment interests constitute property that is subject to compensation when taken by the United States.

This Court has ruled that when a taking occurs, such as Petitioners' liens and interest in the real property, "Petitioners are entitled to recover whatever value their liens had when the Government took title...". *Armstrong v. United States* 364 U.S. 40.

This Court reached a similar conclusion in regards to the occupancy of a leased building by the United States taken from a tenant who held a long-term lease such as Petitioners, *U.S. v. General Motors Corp.* 323 U.S. 373 (1945).

Obviously, it has been established that the United States deprived Petitioners of their leasehold interest, investment, and improvements to the real property without just compensation. In the case of *Armstrong v. United States* and *United States v. General Motors Corp.* the jurisdiction of the Court of Claims was properly invoked to insure just compensation.

Petitioners also properly invoked the jurisdiction of the Court of Claims for the taking of those interests as described above. The Court of claims concluded that said Court could not remedy Petitioners loss for lack of subject matter jurisdiction. The Court of Claims admitted that there was a taking "...the Hammitts have suffered a great personal and economic loss..". This Court has ruled in *Ruckelshaus v. Monsanto Co.* 467 U.S. 986, 1020, "Once

a taking has occurred, the proper forum for Monsanto's (Hammitts) claim is the Claims Court".

The Court of Claims and Court of Federal Appeals insist that because Petitioners did not avail themselves to some procedure under a statutory provision, in this case a civil forfeiture under Title 18 U.S.C. § 983, Petitioners are not entitled to a remedy in the Court of Claims. That assessment by both Courts is contrary to at least three (3) decisions in The Supreme Court of the United States, *Regional Rail Reorganization Act cases* 419 U.S. 102 (1974); *Ruckelshaus v. Monsanto Co.* 467 U.S. 986; *Preseault v. ICC* 419 U.S. 1.

This Court stated in *Preseault v. ICC* 419 U.S. 1, 12

> "If there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the [Claims Court] to hear and determine, *United States v. Causby*, 328 U.S.256, 267 (1946).
>
> The critical question in this case, therefore, is whether a Tucker Act remedy is available for claims arising out of taking pursuant to the Amendment. The proper inquiry is not whether the statute 'expresses an affirmative showing of congressional intent to permit recourse to a Tucker Act remedy,' but rather 'whether Congress has in the [statute] withdrawn the Tucker Act grant of jurisdiction to the [Claims Court] to hear a suit involving the [statute] founded...upon the Constitution'.

> *Regional Rail Reorganization Act cases*, supra, 126 (emphasis in original). Under this standard, we conclude that the Amendments did not withdraw the Tucker Act remedy. Congress did not exhibit the type of 'unambiguous intention to withdraw the Tucker Act remedy,' Monsanto, supra, at1019, that is necessary to preclude a Tucker Act claim....Although Congress did not explicitly promise to pay for any taking, we have always assumed that the Tucker Act is an 'implie[d] promis[e] ' to pay just compensation which individual laws need not reiterate".

This Court reached the same conclusion in *Ruckelshaus v. Monsanto Co.* 467 U.S. 986 (1984),

> "In determining whether a Tucker Act remedy is available for claims arising out of a taking pursuant to a federal statute, the proper inquiry is not whether the statute 'expresses an affirmative showing of congressional intent to permit recourse to a Tucker Act remedy,' but 'whether Congress has in the [statute] withdrawn the Tucker Act grant of jurisdiction to the Court of Claims to hear a suit involving the [statute] founded...upon the Constitution'. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 126, (1974) (emphasis in original)".

This Court further stated in *Ruckelshaus* "A withdrawal of jurisdiction would amount to a partial repeal of the Tucker Act. This Court has recognized, however, that 'repeals by implication are disfavored...'". This Court concluded "Once a taking has occurred, the proper forum for Monsanto's claim is the Claims Court".

This Court based the *Preseault* and *Ruckelshaus,* decisions on *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974). This Court specifically described "cannons of construction" in regards to congressional statutes.

> "In sum, we cannot find that the legislative history supports the argument that the Rail Act (Civil Forfeiture Act) should be construed to withdraw the Tucker Act remedy. The most that can be said is that the Rail Act is ambiguous on the question. In that circumstance, applicable cannons of statutory construction require us to conclude that the Rail Act is not to be read to withdraw the remedy under the Tucker Act.

One cannon of construction is that repeals by implication are disfavored...Rather, since the Tucker Act and the Rail Act are 'capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. Moreover, the Rail Act is the later of the two statutes and we agree with the Special Court:

> 'A new statute will not be read as wholly or even partially amending a prior one unless there exists a positive repugnancy between the provisions of the new and those of the old that cannot be reconciled....This principle rests on a sound foundation. Presumably Congress had given serious thought to the earlier statute, here the broadly based jurisdiction of the Court of Claims. Before holding that the result of the earlier consideration has been repealed or qualified, it is reasonable for a court to insist on the legislature's language showing that it has made a considered determination to that end...'". 384 F. Supp. at 943.

This Court also stated in Regional Rail that

> "The other relevant cannon of construction that comes into play is that when a statute is ambiguous 'construction should go in the direction of constitutional policy'. *United States v. Johnson* 323 U.S. 273, 276 (1944). There are clearly grave doubts whether the Rail Act would be constitutional if a Tucker Act remedy were not available as compensation for any unconstitutional erosion not compensated under the Act itself....*Lynch v. United States*, 292 U.S. 571 (1934), fully supports our conclusion....

CONCLUSION

Had the statute, 18 U.S.C. § 983, explicitly withdrawn the Tucker Act it would not have been necessary for the court to evince anything as the withdrawal would have been explicit and quotable. Simply put, the Court is reading into the statute what Congress did not explicitly place there, a condition precedent, shown by cases cited, to invoke its use. Stated more simply, the Court may not, in lieu of Congress, evince anything.

Petitioners respectfully conclude that there is simply no justification for denying Petitioners a remedy in the United States Court of Federal Claims for lack of subject matter jurisdiction. Supreme Court precedent clearly conflicts with the Court of Claims dismissal, and would leave Petitioners without a remedy based upon a Fifth Amendment taking by the U.S. Government. The Petition for Writ of Certiorari should be granted for the foregoing reasons.

Respectfully submitted,

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Sandra Marie Hammitt

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App. 1 "A"

In the United States Court of Federal Claims
Case No. 05-454L
(Filed December 20, 2005)
TO BE PUBLISHED

.....	Subject matter
RANDY LEE HAMMITT,	jurisdiction; Tucker
SANDRA MARIE HAMMITT,	Act. 28 U.S.C. § 1491
Plaintiffs,	(a) (1); Motion to
	Dismiss; Fifth
v.	Amendment to the
	U.S. Constitution,
THE UNITED STATES OF	taking without just
AMERICA,	compensation, in
Defendant,	*rem* forfeiture; Civil
	Asset Forfeiture
	Reform Act of 2000,
	18 U.S.C. § 983; in
	personam forfeiture,
	review of district court
	decisions timeliness
	leasehold interest;
	power of eminent
	domain; police power
.....	

Randy and Sandra Hammitt, Plaintiffs, pro se

William J. Shapiro, Natural Resources Section, Environment and Natural Resources Division, Department of Justice, Sacramento, CA, attorney of record for Defendant. With him on the briefs was Kelly A. Johnson, Acting Assistant Attorney General.
Sarah Leigh Martin, law clerk.

ORDER/OPINION
Baskir, Judge.

Plaintiffs, appearing *pro se*, claim a taking of their property without compensation in violation of the Fifth Amendment to the U.S. Constitution. Their claim is based upon the United States forfeiture *in rem* of real property in which Plaintiffs claim an interest. This Court does not have jurisdiction over claims based upon forfeitures *in rem* ordered pursuant to statutory procedures. We therefore grant the Defendant's Motion to Dismiss the case.

Background

On August 9, 1999, Plaintiffs Randy Lee and Sandra Marie Hammitt entered into a 25-year agreement to lease property located at 555 Whitethorn Drive, Gastonia North Carolina, from Mr. Phillip Mark Vaughan. The Hammitts resided there until approximately September of 2005. On January 11, 2001, Mr. Vaughan was indicted by a grand jury for money laundering and other federal crimes under 18 U.S.C. §§ 371, 1956 (h).

The lease agreement gave the Plaintiffs a first option to purchase the property, which they attempted to enforce on March 18, 2002. Mr. Vaughan refused to sell the property to the Hammitts. In response, the Hammitts filed a quiet title action in the Superior Court of Gaston County on April 30, 2003. Mr. Vaughan failed to appear most likely due to the fact that on May 8, he was convicted of certain racketeering crimes and incarcerated. The Superior Court entered a default judgment against him in the quiet title action on June 3. The Hammitts

attempted to enforce the judgment and acquire legal title to the property, but were unsuccessful.

While the Hammitts' quiet title action was pending, on May 30, 2003, the United States filed a complaint for forfeiture in rem in the U.S. District Court for the Western District of North Carolina pursuant to the general federal civil forfeiture statutes. See 18 U.S.C. §§ 981, 983, 985; 19 U.S.C. §§ 1602-1621; Def. Brief at Tab. 2 The complaint was entitled "Complaint for Forfeiture In Rem," with the case name labeled as: United States of America v. Real Property Located at 555 Whitethorn Drive, Gastonia, N.C., and Other Property Associated with Phillip Mark Vaughan, Def. Brief at Tab. 2 It alleged that the subject properties were the proceeds of and/or were used to facilitate Mr. Vaughan's money laundering crimes. The Hammitts received notice of the forfeiture action pursuant to 18 U.S.C. § 983 (a).

Although it is unclear from the record whether they received personal service of the forfeiture action, the parties agree that a minimum, notice of the forfeiture was posted on the real property itself, where the Plaintiffs were residing at the time.

The Hammitts filed a "Verified Statement of Interest and Show Cause" on June 20, one day after the 20-day statutory time limit for interested parties to intervene in forfeiture proceedings. See § 983 (a) (4) (B). They did not file an answer to the complaint. The district court held the Hammitts in default for failing to file a timely answer to the forfeiture complaint. The court also found that the complaint was supported by probable cause, and

granted the forfeiture in tem on October 26. The court stated of the property: [A]ll right, title and interest of all persons in the world in or to [the subject property] is hereby forfeited to the United States; and no other right, title or interest shall exist therein." Def. Brief. At Tab 1.

On January 28, 2005, Plaintiff Randy Hammitt filed a "Complaint in Tort" against Federal employees, including numerous U.S. Marshals. The Complaint was dismissed for lack of subject matter jurisdiction on March 23. *Hammitt v. United States*, 64 Fed. Cl. 547 (2005). On March 11, the district court ordered the Hammitts to vacate the property, and on April 1, U.S. Marshals personally served them with an order requiring them to vacate. The Hammitts did not move off the property at that time. On April 7, they filed their Complaint in this Court, alleging that the forfeiture constituted a taking of their real; property without just compensation required by the Fifth Amendment. Among other things, the Complaint challenges the legitimacy of the forfeiture action and the Federal Government's jurisdiction over real property located in North Carolina. On April 12, Plaintiffs moved this Court for a Temporary Restraining Order and Preliminary Injunction to prevent the Government from evicting them from the property. The Court took no action on the Hammitts motion.

The Plaintiffs moved on June 15, 2005, to withdraw their request for injunction relief. In the motion, they changed their legal position, insisting that they will not ask this Court to scrutinize the district court's forfeiture decision. They admitted that the Government acted within its authority in the forfeiture action, but claimed that the forfeiture requires just compensation. In the Joint

Preliminary Status Report (JPSR) the Hammitts reiterated their position that they do not challenge the validity of the forfeiture proceeding. However, in their Brief in Opposition to the Defendant Motion to Dismiss, filed on October 27, the Hammitts once again changed their legal position, alleging that their property was "illegally seized and confiscated" by the United States, depriving them of a property interest "without due process of law." See Pl. Brief at 5. In a supplemental filing of December 8, discussed below, the Hammitts again collaterally challenge the district court's forfeiture ruling, claiming that the United States "tortuously interfered with" their property interest. Finally, in an oral argument held by the Court on December 13, the Hammitts stated their official position – that they do not ask this Court to scrutinize the district court's opinion. The significance of these inconsistent positions will be discussed below.

While their action was pending before this Court, the District Court for the Western District of North Carolina held Randy Hammitt in contempt of court on September 21 for failing to move off the property. Mr. Hammitt was assessed $6, 100. The Plaintiffs subsequently vacated the property.

On December 8, after briefing on the Defendant's Motion to Dismiss was completed, the Hammitts filed a document entitled "Mandatory Judicial Notice Rule of Evidence 201 (d)". In the statement, they allege that as a result of Mr. Vaughan's criminal conviction, his property was subject to an *in personam* forfeiture on May 8, 2003, before the *in rem* forfeiture proceeding had commenced. In support of this claim, they included in their filing an affidavit signed by Mr. Vaughan, in which he waived

all right, title, and interest in the subject property.

As the Defendant pointed out in oral argument, however, this waiver did not constitute a forfeiture of the property to the Government, but was merely a promise by Mr. Vaughan that he would not assert an interest in the property in any subsequent forfeiture proceeding.

In their supplemental filing, Plaintiffs argue that their taking claim is based on the alleged *in personam* forfeiture. They also claim that the doctrine of *res judicata* prevented any subsequent action involving "the same claim and person" presumably implying that the subsequent *in rem* forfeiture is invalid. Although the filing was untimely and the Hammitts did not seek the Court's permission to file it, the Court accepted the document without objection from the Defendant.

At the Court's request, the Defendant filed a copy of Mr. Vaughan's criminal conviction on December 14. Two pages of the eight-page document were filed under seal because of their designation as confidential material. The criminal judgment established that Mr. Vaughan's conviction did no result in an *in personam* forfeiture of his property, contrary to the Hammitts' claim. The subject property was forfeited by way of an *in rem* civil proceeding, and no evidence in the record contradicts this conclusion.

Discussion

Before the Court is the Defendant's Motion to Dismiss for lack of subject matter jurisdiction, based on U.S. Court of Federal Claims Rule 12 (b) (1). On motions to dismiss, the Court views the facts alleged in the

Complaint in the light most favorable to the non-moving party. See *Patton v. United States*, 64 Fed. Cl. 768, 773 (2005) Moreover, the Plaintiffs are appearing *pro se*, thus requiring us to be especially indulgent. See *Forshey v. Princiio*, 284 F. 3rd 1335, 1357-58 (Fed. Ct. 2005) (*en banc*). Because the Defendant's motion challenges this Court's jurisdiction, we may also consider outside evidence. Patton, 64 Fed. Cl at 773.

The U.S. Court of Federal Claims is, like all Federal courts, a court of limited jurisdiction. See *Brown v. United States*, 105 F. 3d 621, 623,(Fed. Cir. 1997). This Court may only hear a claim brought against the United States if Congress specifically and unambiguously waived the government's sovereign immunity for such a suit. *United States v. King*, 395 U.S.1, 4 (1969). According to the Tucker Act, a suit may be brought to this Court if it is founded upon the Constitution, an Act of Congress, a regulation, or a contract with the United States, if it does not sound in tort. 28 U.S.C § 1491 9a) (1). The Tucker Act does not itself create a substantive right of recovery; a plaintiff must identify a money-mandating provision creating a substantive right and waiving the United States' sovereign immunity in order for this Court to have jurisdiction. E.g., *United States v. Mitchell*, 445 U.S. 535,538 (1980); *United States v. Testan*, 424 U.S. 392, 298 (1976).

In their Complaint, the Hammitts allege that the forfeiture *in rem* was a taking in violation of the Fifth Amendment to the U.S. Constitution, which states in relevant part: "nor shall private property be taken for public use, without just compensation." U.S. Const. Amend V. The Fifth Amendment qualifies as a money-

mandating provision that confers jurisdiction on this Court. *Murray v. United States*, 817 F. 2d 1580, 1583 (Fed. Cir. 1987).

Nonetheless, the U.S. Court of Federal Claims does not have jurisdiction over the Hammitts' claim. As the U.S. Court of Appeals for the Federal Circuit has clearly stated, this Court does not have jurisdiction over a Fifth Amendment taking claim based on the federal government's *in rem* forfeiture of property when the plaintiff could have participated in the proceedings. *Vereda, Ltda. V. United States*, 271 F. 3d 1367, 1376 (Fed. Circ.2001). In Vereda, the court so held for two reasons.

First, the Court's Tucker Act jurisdiction is preempted when Congress has enacted a "specific and comprehensive scheme for administrative and judicial review" of the governmental action. Id. at 1375 (quoting St. Vincient's Med. Ctr. V. United States, 32 F. 3d 548, 549-50 (Fed. Cir. 1994). In addition to affording interested parties due process, such a scheme "evinces Congress' intent to preempt any Tucker Act jurisdiction over a money claim that challenges the property of an *in rem* administrative forfeiture of property..." Vereda, 271 F. 3d at 1375. The statutory scheme in Vereda gave the plaintiff the ability to challenge directly the *in rem* forfeiture administratively and in district court. Id.

Second, Vereda held that the Court of Federal Claims does not have jurisdiction to review collaterally the decisions of district courts. Id. at 1375 (citing *Joshua v. United States*, 17 F. 3d 378, 380 (Fed. Cir. 2001). The

plaintiff based its complaint "on challenge to the substantive validity of the forfeiture of its interest in the" property. Vereda 271 F. 3d at 1374. Therefore, the plaintiff's taking claim in that case would have required the court to scrutinize the substantive decisions of another tribunal underlying the *in rem* forfeiture, and thus the claim was not cognizable in the Court of Federal Claims. Id. at 1375.

The facts in the instant case are almost identical to those in Vereda. In Vereda, the comprehensive scheme that deprived the Court of Federal Claims of jurisdiction consisted of the statutes governing administrative forfeitures by the U.S. Customs Service. See Id. 1371; 19 U.S.C. § 1607 et seq. The applicable sections required the seizing agency to publish notice of the forfeiture action, and provide that the proceeding be halted and transferred to district court if any person filed a claim of ownership within twenty days of publication. 271 F. 3d at 1371. The claimant would then have an opportunity to challenge the merits of the forfeiture action in district court. Id.

The forfeiture in this case was governed by the procedures set forth in the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), 18 U.S. C. § 983. See Vereda, 271 F. 3d at 1371 n.4 (noting that CAFRA was enacted after the forfeiture at issue in Vereda in order to address due process concerns of civil forfeiture proceedings). Similar to the scheme in Vereda, CAFRA requires the government to provide written notice to interested parties, § 983 (a) (1) (A) (i), and allows an interest party to intervene in the forfeiture action by filing an answer within 20 days, § 983 (a) (4) (B). The claimant may then

assert his or her interest in the action, including a potential innocent owner defense. See § 983 (d). This scheme also provides for adjudication of the government's forfeiture. § 983 (c) (the district court must determine by a preponderance of evidence that the property is subject to forfeiture). Consequently, Vereda compels a finding that by enacting CAFRA, Congress intended to preempt this Court's Tucker Act jurisdiction over Plaintiffs' taking claims.

The Plaintiffs rely upon a Federal Circuit case, Shelden v. United States, 7 F. 3d 1022 (Fed. Cir. 1993), upholding a taking claim that resulted from the government's forfeiture action. As the Defendant points out in its brief and Vereda recognized Shelden is distinguishable from the Hammitts's situation. See Vereda, 271 F. 3d at 1376. Simply put, Shelden involved an *in personam* forfeiture that automatically accompanied a criminal conviction, whereas Vereda involved a forfeiture *in rem* pursuant to a civil proceeding. Id. While the former action is intended to punish the property owner for wrongdoing and may incidentally burden an innocent party, the latter is directed against the property itself and allows for innocent owners to assert their rights in the proceedings. Id. The Vereda court made it clear that the allegedly innocent plaintiffs in Shelden could not assert their interests in the in personam forfeiture proceedings. Rather, the property was forfeited as part of the criminal defendants conviction in that case, not as a separate civil action. Id. The plaintiffs did not have a comprehensive scheme of administrative and judicial process available to them to protect their rights. Id.

The Hammitts challenge a civil forfeitue *in rem*, not a criminal *in personam* forfeiture, so Vereda, not Shelden, controls. Contrary to their assertions, see Pl. Brief at 5, the civil forfeiture proceedings allowed them an opportunity to assert their rights and protect their interest in the property by timely answering the government's complaint. The fact that the Hammitts did not intervene in the forfeiture proceeding in a timely manner is irrelevant. And to the extent that they challenge the district court's refusal to allow them to intervene because of untimeliness, their proper redress is to the district court and the court of appeals, not to this Court. As far as this Court is concerned, the district court's decision was a final disposition of the Hammitts' property interest with which we may not interfere.

At oral argument, the Hammitts clarified that unlike the plaintiff in Vereda, they are not asking this Court to scrutinize the district court's forfeiture decision. Compare JPSR at 2 (stating that Plaintiffs have no intent to request that this Court scrutinize the decision of the district court), with Vereda, 271 F. 3d at 1374 (noting that the plaintiff challenged the administrative forfeiture on the basis that the property's "guilt" was unsubstantiated). In the JPSR, the Hammitts assigned no defect to the forfeiture but accepted that the government properly asserted its forfeiture power in this case. They claimed that the forfeiture gives rise to a separate and distinct cause of action for a Fifth Amendment taking because it resulted in the taking of their real property. Their argument misunderstands the nature of the government's powers at issue in this case, as well as the district court's forfeiture order.

The federal government's powers of forfeiture and eminent domain are distinct. Crocker v. United States, 37 Fed. Cl. 191, 195 (1997). The forfeiture originates from the government's police power, and forfeitures in rem are thought to "punish" property for being connected to illegal activity. *Calero-Toledo v. Pearson Yacht Leasing Co.* 416 U.S. 663,686 (1974) (describing the history of forfeiture in the United States). In contrast, the power of eminent domain "undertakes to redistribute certain economic losses inflicted by public improvements so that they will fall upon the public rather than wholly upon those who happen to lie in the path of the project". *Atlas Corp. V. United States* 895 F. 2d 745, 756 (Fed. Cir. 1990) (citing *United States v. Willow River Power Co.*, 324 U.S. 499. 502 (1945)). The loss of property in an *in rem* forfeiture is punitive, based on the property's connection with crime and the government's need to eradicate it. It is not the type of consequential loss that should be born by the public as a whole.

The distinction between eminent domain and forfeiture has led this Court to hold numerous times that if the government properly effectuates a forfeiture in rem, a compensable Fifth Amendment taking has not occurred. E.g., *Perry v. United States*, 28 Fed. Cl. 82, 85 (1993); *Eversleigh v. United States*, 24 Cl. Ct. 357, 359 (1991). The U.S. Supreme Court has also recognized this principle. See *Bennis v. Michigan*, 5`6 U.S. 442, 452 (1996) ("The government may not be required to compensate an owner for property which has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain."). In other words, an *in rem* forfeiture cannot also be a Fifth Amendment taking.

For the same reason, a Fifth Amendment taking claim may not be based upon a lawful forfeiture *in rem.* Therefore, the Hammitts' assertion that the government took their property in violation of the Fifth Amendment is tantamount to a claim that the district court's forfeiture decision was invalid. Cf. *Allustiarte v. United States*, 256 F. 3d 1349, 1351-52 (Fed. Cir. 2001) (determining whether a taking occurred would require the Court of Federal Claims to scrutinize bankruptcy courts' decisions, despite plaintiff's assurances that the decisions were authorized by law). We do not have jurisdiction to review decisions of the district courts, such as the decision granting the forfeiture in this case. See Joshua, 17 F. 3d at 380.

Finally, the district court's forfeiture order clearly states "[All right, title and interest of all persons in the world in or to [the subject property] is hereby forfeited to the United States; and no other right, title or interest shall exist therein." Def. Brief. At Tab. 1. The Court interprets the phrase "all right, title and interest" to include the interest of the Hammitts' are asserting in this case. To hold that the Hammitts continue to have interest in the property despite the district court's ruling would contravene that ruling.

Conclusion

We are mindful of the fact that the Hammitts have suffered a great personal an economic loss by reason of the illegal activity of their landlord, and through no fault of their own. Nonetheless, this Court has no authority to remedy this loss.

In sum, this Court does not have jurisdiction over this taking claim. Our Tucker Act jurisdiction is preempted when Congress has put in place a comprehensive scheme for administrative and judicial review. The Plaintiffs' Complaint would require us to scrutinize the district court's decision to determine whether the government properly exercised its forfeiture power.

For the foregoing reasons, the Defendant's Motion to Dismiss is GRANTED, and the case is DISMISSED for lack of subject matter jurisdiction.

IT IS SO ORDERED.

LAWRENCE M. BASKIR
Judge

App. 2 "B"

NOTE: This disposition is nonprecedential.

United States Court of Appeals
for the Federal Circuit

2006-5062
RANDY LEE HAMMITT,
Plaintiff-Appellant,
and
SANDRA MARIE HAMMITT,
Plaintiff-Appellant,

v.
UNITED STATES,
Defendant-Appellee,

DECIDED: December 26, 2006

Before NEWMAN, DYK, AND PROST, Circuit Judges.
Newman, Circuit Judge.

Plaintiffs Randy Lee and Sandra Marie Hammitt ('the Hammitts" appeal the decision of the United States Court of Federal Claims dismissing the Hammitts' Fifth Amendment takings claim for lack of subject matter jurisdiction. The Hammitts held the leasehold of real property that was the subject of a civil *in rem* forfeiture proceeding on federal crimes committed by the owner of the property, to which the property is presumed to have contributed. The Hammitts argue that this constituted a taking of their leasehold, warranting just compensation

under the Fifth Amendment. The Court of Federal Claims held that the only path of relief for the Hammitts was in the district court and regional circuit in accordance with 18 U.S.C. § 983, and not in the Court of Federal Claims. We affirm the dismissal on this ground.

Discussion

In 1999 the Hammitts entered into a 25-year lease agreement with Phillip Mark Vaughan for certain real property including a house in Gastonia, North Carolina, in which the Hammitts lived ("the Gastonia Property"). The lease agreement contained a first option to purchase the property. In 2001 the Hammitts attempted to exercise the purchase option after Mr. Vaughan was indicted and charged with various racketeering-type federal crimes. Mr. Vaughan refused to sell the property to the Hammitts. They filed a quiet title claim in the Superior Court of Gaston County on April 30, 2003, and obtained a default judgment on June 3, 2003 when Mr. Vaughan failed to respond, apparently due to his incarceration.

On May 30, 2003, while the quiet tile case was pending in Gaston County, the United States filed a complaint under the Civil Asset Forfeiture Reform Act, 18 U.S.C. § 981 et seq., in the United States District Court for the Western District of North Carolina, seeking civil forfeiture in rem of various properties associated with Mr. Vaughan, including the Gastonia Property. The notice of proposed forfeiture was posted on the Gastonia Property where the Hammitts were residing, and stated that "a person asserting an interest in seized property...shall file an answer to the Government's complaint for forfeiture not later than 20 days after the date of the filing of the claim." 18 U.S.C. § 983 (a) (4) (B).

The Hammitts filed a "Verified Statement of Interest and Show Cause" in the district court on June 20, 2003, but did not directly file an answer to the complaint, and in any event exceeded the 20-day response period by one day. The Hammitts' argument that their state adjudication of property rights controlled, and they concurrently sought to enforce their quiet title judgment in state court. The district court held the Hammitts in default under the forfeiture statute.

The statute contains an "innocent owner defense,"§ 983 (d), that "An innocent owner's interest in the property shall not be forfeited under any civil forfeiture statute. §983 (d) (1)". The statute provides no additional procedure for innocent owners who receive actual notice for the filing of the complaint for forfeiture of the 20-day statutory period for answering the complaint. The Hammitts unsuccessfully petitioned the district court and appealed to the Fourth Circuit Court of Appeals by way of mandamus motion, which the court denied. In re Hammitt, 81 F. App'x 790 (4th Cir. December 3, 2003).

On October 26, 2004 the federal district court issued final judgment to the United States for civil forfeiture of the Gastonia Property, and on March 11, 2005 the district court ordered the Hammitts to vacate the Gastonia Property. They resisted, and only after contempt proceedings were brought (apparently at the invitation of the holder of the mortgage, whose interest in the property had been timely asserted and had been recognized by the district court), did they vacate the property.

On April 7, 2005 the Hammitts filed a Fifth Amendment taking claim in the Court of Federal Claims,

seeking just compensation for the taking by the United States of their leasehold and interest in the Gastonia Property. The Court of Federal Claims held that the only remedy available to the Hammitts was through the district court and the proceedings provided by 18 U.S.C. § 983. The Hammitts do not now dispute that the district court had authority to order the in rem forfeiture of the Gastonia property. However, they argue that their constitutional claim cannot be preempted, and that the government's taking of their property interest, although there was no wrongdoing on their part, raises an issue of Fifth Amendment taking.

The Court of Federal Claims applied Vereda, Ltda v. United States 271 F. 3d 1367 (Fed. Cir. 2001), which held in connection with the forfeiture provision in the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S. C. §881 (a), that when "a 'specific and comprehensive scheme for administrative and judicial review' is provided by Congress, the Court of Federal Claims' Tucker Act jurisdiction over the subject matter covered by the scheme is preempted."

Applying Vereda, the Court of Federal Claims correctly held that whether the Hammitts' participation was adequate and timely, and whether the adjudications were correct, are not subject to collateral review by the Court of Federal Claims. The forfeiture statute provides reasonable procedures, and the Hammitts' claim was presented, in mandamus petition, to the cognizant circuit court of appeals. There remains no basis for Tucker Act jurisdiction.

No costs.

App. 3 "C"

United States Court of Appeals for the
Federal Circuit

2005-5062

RANDY LEE HAMMITT,
Plaintiff-Appellant,
and
SANDRA MARIE HAMMITT,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee,

JUDGMENT

ON APPEAL from the United States Court of
Federal Claims
In case NO (s). 05-CV-454
This CAUSE having been heard and considered, it is
ORDERED and ADJUDGED: AFFIRMED

DATED December 26, 2006 Entered by Order of
The Court
Jan Horbaly, Clerk

Issued as a Mandate: Mar. 8, 2007

App. 4 "D"

UNITED STATES COUR OF APPEALS
FOR THE FEDERAL CIRCUIT

2006-5062

RANDY LEE HAMMITT,
Plaintiff-Appellant,
and
SANDRA MARIE HAMMITT,
Plaintiff-Appellant,
v.
UNITED STATES,
Defendant-Appellee,

NOTE: This order is nonprecedential

ORDER

A petition for rehearing en banc having been filed by the Appellants and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is ORDERED that the petition for rehearing be, and the same hereby is DENIED, and it is further,

ORDERED that the petition for rehearing en banc be, and the same hereby is DENIED.

The mandate of the court will issue on March 8, 2007.
FOR THE COURT,
Jan Horbaly, Clerk

Dated: 03/01/2007

cc: Randy Lee Hammitt, Sandra Marie Hammitt
William Shapiro

HAMMITT V US, 2006-5062
(CFC-05-454)

Filed
U.S. Court of Appeals for
The Federal Circuit
March 1—2007

Jan Horbaly, Clerk

App. 5 "E"

Fifth Article in Amendment
Constitution of the United States of America

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation".

App. 6 "F"
Title 28 U.S.C. § 1346

(a)

(The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this

paragraph, an express or implied contract the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b)

(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

(c) The jurisdiction conferred by this section

includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228 (a), 7426, or 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1986.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

(g) Subject to the provisions of chapter 179, the district courts of the United States shall have exclusive jurisdiction over any civil action commenced under section 453 (2) of title 3, by a covered employee under chapter 5 of such title.

App. 7 "G"
Title 28 U.S.C. § 1491

Claims Against the United States Generally; Actions Involving Tennessee Valley Authority

(a)

(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official

with such direction as it may deem proper and just. The Court of Federal Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978, including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6 of that Act.

(b)

(1) Both the Unites [1] States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

(2) To afford relief in such an action, the courts may award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs.

(3) In exercising jurisdiction under this

subsection, the courts shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action.

(4) In any action under this subsection, the courts shall review the agency's decision pursuant to the standards set forth in section 706 of title 5.

(c) Nothing herein shall be construed to give the United States Court of Federal Claims jurisdiction of any civil action within the exclusive jurisdiction of the Court of International Trade, or of any action against, or founded on conduct of, the Tennessee Valley Authority, or to amend or modify the provisions of the Tennessee Valley Authority Act of 1933 with respect to actions by or against the Authority.

App. 8 "H"
Title 18 U.S.C. § 983
General Rules for Civil Forfeiture Proceedings

Notice; Claim; Complaint.—

(1)

(A)

(i) Except as provided in clauses (ii) through (v), in any nonjudicial civil forfeiture proceeding under a civil forfeiture statute, with respect to which the Government is required to send written notice to interested parties, such notice shall be sent in a manner to achieve proper notice as soon as practicable, and in no case more than 60 days after the date of the seizure.

(ii) No notice is required if, before the 60-day period expires, the Government files a civil judicial forfeiture action against the property and provides notice of that action as required by law.

(iii) If, before the 60-day period expires, the Government does not file a civil judicial forfeiture action, but does obtain a criminal indictment containing an allegation that the property is subject to forfeiture, the Government shall either—

(I) send notice within the 60 days and continue the nonjudicial civil forfeiture proceeding under this section; or

(II) terminate the nonjudicial civil forfeiture proceeding, and take the steps necessary to preserve its right to maintain custody of the property as provided in the applicable criminal forfeiture statute.

(iv) In a case in which the property is seized by a State or local law enforcement agency and turned over to a Federal law enforcement agency for the purpose of forfeiture under Federal law, notice shall be sent not more than 90 days after the date of seizure by the State or local law enforcement agency.

(v) If the identity or interest of a party is not determined until after the seizure or turnover but is determined before a declaration of forfeiture is entered, notice shall be sent to such interested party not later than 60 days after the determination by the Government of the identity of the party or the party's interest.

(B) A supervisory official in the headquarters office of the seizing agency may extend the period for sending notice under subparagraph (A) for a period not to exceed 30 days (which period may not be further extended except by a court), if the official determines that the conditions in subparagraph (D) are present.

(C) Upon motion by the Government, a

court may extend the period for sending notice under subparagraph (A) for a period not to exceed 60 days, which period may be further extended by the court for 60-day periods, as necessary, if the court determines, based on a written certification of a supervisory official in the headquarters office of the seizing agency, that the conditions in subparagraph (D) are present.

(D) The period for sending notice under this paragraph may be extended only if there is reason to believe that notice may have an adverse result, including—

(i) endangering the life or physical safety of an individual;

(ii) flight from prosecution;

(iii) destruction of or tampering with evidence;

(iv) intimidation of potential witnesses; or

(v) otherwise seriously jeopardizing an investigation or unduly delaying a trial.

(E) Each of the Federal seizing agencies conducting nonjudicial forfeitures under this section shall report periodically to the Committees on the Judiciary of the House of Representatives and the Senate the number of occasions when an extension of time is granted under subparagraph (B).

(F) If the Government does not send notice of a seizure of property in accordance with subparagraph (A) to the

person from whom the property was seized, and no extension of time is granted, the Government shall return the property to that person without prejudice to the right of the Government to commence a forfeiture proceeding at a later time. The Government shall not be required to return contraband or other property that the person from whom the property was seized may not legally possess.

(2)

(A) Any person claiming property seized in a nonjudicial civil forfeiture proceeding under a civil forfeiture statute may file a claim with the appropriate official after the seizure.

(B) A claim under subparagraph (A) may be filed not later than the deadline set forth in a personal notice letter (which deadline may be not earlier than 35 days after the date the letter is mailed), except that if that letter is not received, then a claim may be filed not later than 30 days after the date of final publication of notice of seizure.

(C) A claim shall—

(i) identify the specific property being claimed;

(ii) state the claimant's interest in such property; and

(iii) be made under oath, subject to penalty of perjury.

(D) A claim need not be made in any particular form. Each Federal agency

conducting nonjudicial forfeitures under this section shall make claim forms generally available on request, which forms shall be written in easily understandable language.

(E) Any person may make a claim under subparagraph (A) without posting bond with respect to the property which is the subject of the claim.

(3)

(A) Not later than 90 days after a claim has been filed, the Government shall file a complaint for forfeiture in the manner set forth in the Supplemental Rules for Certain Admiralty and Maritime Claims or return the property pending the filing of a complaint, except that a court in the district in which the complaint will be filed may extend the period for filing a complaint for good cause shown or upon agreement of the parties.

(B) If the Government does not—

(i) file a complaint for forfeiture or return the property, in accordance with subparagraph (A); or

(ii) before the time for filing a complaint has expired—

(I) obtain a criminal indictment containing an allegation that the property is subject to forfeiture; and

(II) take the steps necessary to preserve its right to maintain custody of the property as

provided in the applicable criminal forfeiture statute,

the Government shall promptly release the property pursuant to regulations promulgated by the Attorney General, and may not take any further action to effect the civil forfeiture of such property in connection with the underlying offense.

(C) In lieu of, or in addition to, filing a civil forfeiture complaint, the Government may include a forfeiture allegation in a criminal indictment. If criminal forfeiture is the only forfeiture proceeding commenced by the Government, the Government's right to continued possession of the property shall be governed by the applicable criminal forfeiture statute.

(D) No complaint may be dismissed on the ground that the Government did not have adequate evidence at the time the complaint was filed to establish the forfeitability of the property.

(4)

(A) In any case in which the Government files in the appropriate United States district court a complaint for forfeiture of property, any person claiming an interest in the seized property may file a claim asserting such person's interest in the property in the manner set forth in the Supplemental Rules for Certain

Admiralty and Maritime Claims, except that such claim may be filed not later than 30 days after the date of service of the Government's complaint or, as applicable, not later than 30 days after the date of final publication of notice of the filing of the complaint.

(B) A person asserting an interest in seized property, in accordance with subparagraph (A), shall file an answer to the Government's complaint for forfeiture not later than 20 days after the date of the filing of the claim.

(b) Representation.—

(1)

(A) If a person with standing to contest the forfeiture of property in a judicial civil forfeiture proceeding under a civil forfeiture statute is financially unable to obtain representation by counsel, and the person is represented by counsel appointed under section 3006A of this title in connection with a related criminal case, the court may authorize counsel to represent that person with respect to the claim.

(B) In determining whether to authorize counsel to represent a person under subparagraph (A), the court shall take into account such factors as—

(i) the person's standing to contest the forfeiture; and

(ii) whether the claim appears to be made in good faith.

(2)

(A) If a person with standing to contest the forfeiture of property in a judicial civil forfeiture proceeding under a civil forfeiture statute is financially unable to obtain representation by counsel, and the property subject to forfeiture is real property that is being used by the person as a primary residence, the court, at the request of the person, shall insure that the person is represented by an attorney for the Legal Services Corporation with respect to the claim.

(B)

(i) At appropriate times during a representation under subparagraph (A), the Legal Services Corporation shall submit a statement of reasonable attorney fees and costs to the court.

(ii) The court shall enter a judgment in favor of the Legal Services Corporation for reasonable attorney fees and costs submitted pursuant to clause (i) and treat such judgment as payable under section 2465 of title 28, United States Code, regardless of the outcome of the case.

(3) The court shall set the compensation for representation under this subsection, which shall be equivalent to that provided for court-appointed representation under section 3006A of this title.

(c) Burden of Proof.— In a suit or action brought under any civil forfeiture statute for the civil forfeiture of any property—

(1) the burden of proof is on the Government to establish, by a preponderance of the evidence, that the property is subject to forfeiture;
(2) the Government may use evidence gathered after the filing of a complaint for forfeiture to establish, by a preponderance of the evidence, that property is subject to forfeiture; and
(3) if the Government's theory of forfeiture is that the property was used to commit or facilitate the commission of a criminal offense, or was involved in the commission of a criminal offense, the Government shall establish that there was a substantial connection between the property and the offense.

(d) Innocent Owner Defense.—

(1) An innocent owner's interest in property shall not be forfeited under any civil forfeiture statute. The claimant shall have the burden of proving that the claimant is an innocent owner by a preponderance of the evidence.

(2)

(A) With respect to a property interest in existence at the time the illegal conduct giving rise to forfeiture took place, the term "innocent owner" means an owner who—

(i) did not know of the conduct giving rise to forfeiture; or
(ii) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property.

(B)

(i) For the purposes of this paragraph, ways in which a person may show that such person did all that reasonably could be expected may include demonstrating that such person, to the extent permitted by law—

(I) gave timely notice to an appropriate law enforcement agency of information that led the person to know the conduct giving rise to a forfeiture would occur or has occurred; and

(II) in a timely fashion revoked or made a good faith attempt to revoke permission for those engaging in such conduct to use the property or took reasonable actions in consultation with a law enforcement agency to discourage or prevent the illegal use of the property.

(ii) A person is not required by this subparagraph to take steps that the person reasonably believes would be likely to subject any person (other than the person whose conduct gave rise to the forfeiture) to physical danger.

(3)

(A) With respect to a property interest acquired after the conduct giving rise to the forfeiture has taken place, the

term "innocent owner" means a person who, at the time that person acquired the interest in the property—

(i) was a bona fide purchaser or seller for value (including a purchaser or seller of goods or services for value); and

(ii) did not know and was reasonably without cause to believe that the property was subject to forfeiture.

(B) An otherwise valid claim under subparagraph (A) shall not be denied on the ground that the claimant gave nothing of value in exchange for the property if—

(i) the property is the primary residence of the claimant;

(ii) depriving the claimant of the property would deprive the claimant of the means to maintain reasonable shelter in the community for the claimant and all dependents residing with the claimant;

(iii) the property is not, and is not traceable to, the proceeds of any criminal offense; and

(iv) the claimant acquired his or her interest in the property through marriage, divorce, or legal separation, or the claimant was the spouse or legal dependent of a person whose death resulted in the transfer of the property to the claimant through inheritance or probate,

except that the court shall limit the value

of any real property interest for which innocent ownership is recognized under this subparagraph to the value necessary to maintain reasonable shelter in the community for such claimant and all dependents residing with the claimant.

(4) Notwithstanding any provision of this subsection, no person may assert an ownership interest under this subsection in contraband or other property that it is illegal to possess.

(5) If the court determines, in accordance with this section, that an innocent owner has a partial interest in property otherwise subject to forfeiture, or a joint tenancy or tenancy by the entirety in such property, the court may enter an appropriate order—

(A) severing the property;

(B) transferring the property to the Government with a provision that the Government compensate the innocent owner to the extent of his or her ownership interest once a final order of forfeiture has been entered and the property has been reduced to liquid assets; or

(C) permitting the innocent owner to retain the property subject to a lien in favor of the Government to the extent of the forfeitable interest in the property.

(6) In this subsection, the term "owner"—

(A) means a person with an ownership interest in the specific property sought to be forfeited, including a leasehold, lien, mortgage, recorded security interest, or valid assignment of an

ownership interest; and

(B) does not include—

(i) a person with only a general unsecured interest in, or claim against, the property or estate of another;

(ii) a bailee unless the bailor is identified and the bailee shows a colorable legitimate interest in the property seized; or

(iii) a nominee who exercises no dominion or control over the property.

(e) Motion To Set Aside Forfeiture.—

(1) Any person entitled to written notice in any nonjudicial civil forfeiture proceeding under a civil forfeiture statute who does not receive such notice may file a motion to set aside a declaration of forfeiture with respect to that person's interest in the property, which motion shall be granted if—

(A) the Government knew, or reasonably should have known, of the moving party's interest and failed to take reasonable steps to provide such party with notice; and

(B) the moving party did not know or have reason to know of the seizure within sufficient time to file a timely claim.

(2)

(A) Notwithstanding the expiration of any applicable statute of limitations, if the court grants a motion under paragraph (1), the court shall set aside the declaration of forfeiture as to the

interest of the moving party without prejudice to the right of the Government to commence a subsequent forfeiture proceeding as to the interest of the moving party.

(B) Any proceeding described in subparagraph (A) shall be commenced—

(i) if nonjudicial, within 60 days of the entry of the order granting the motion; or

(ii) if judicial, within 6 months of the entry of the order granting the motion.

(3) A motion under paragraph (1) may be filed not later than 5 years after the date of final publication of notice of seizure of the property.

(4) If, at the time a motion made under paragraph (1) is granted, the forfeited property has been disposed of by the Government in accordance with law, the Government may institute proceedings against a substitute sum of money equal to the value of the moving party's interest in the property at the time the property was disposed of.

(5) A motion filed under this subsection shall be the exclusive remedy for seeking to set aside a declaration of forfeiture under a civil forfeiture statute.

(f) Release Of Seized Property.—

(1) A claimant under subsection (a) is entitled to immediate release of seized property if—

(A) the claimant has a possessory interest in the property;

(B) the claimant has sufficient ties to the community to provide assurance that the property will be available at the time of the trial;

(C) the continued possession by the Government pending the final disposition of forfeiture proceedings will cause substantial hardship to the claimant, such as preventing the functioning of a business, preventing an individual from working, or leaving an individual homeless;

(D) the claimant's likely hardship from the continued possession by the Government of the seized property outweighs the risk that the property will be destroyed, damaged, lost, concealed, or transferred if it is returned to the claimant during the pendency of the proceeding; and

(E) none of the conditions set forth in paragraph (8) applies.

(2) A claimant seeking release of property under this subsection must request possession of the property from the appropriate official, and the request must set forth the basis on which the requirements of paragraph (1) are met.

(3)

(A) If not later than 15 days after the date of a request under paragraph (2) the property has not been released, the claimant may file a petition in the district court in which the complaint has been filed or, if no complaint has

been filed, in the district court in which the seizure warrant was issued or in the district court for the district in which the property was seized.

(B) The petition described in subparagraph (A) shall set forth—

(i) the basis on which the requirements of paragraph (1) are met; and

(ii) the steps the claimant has taken to secure release of the property from the appropriate official.

(4) If the Government establishes that the claimant's claim is frivolous, the court shall deny the petition. In responding to a petition under this subsection on other grounds, the Government may in appropriate cases submit evidence ex parte in order to avoid disclosing any matter that may adversely affect an ongoing criminal investigation or pending criminal trial.

(5) The court shall render a decision on a petition filed under paragraph (3) not later than 30 days after the date of the filing, unless such 30-day limitation is extended by consent of the parties or by the court for good cause shown.

(6) If—

(A) a petition is filed under paragraph (3); and

(B) the claimant demonstrates that the requirements of paragraph (1) have been met,

the district court shall order that the property be returned to the claimant, pending completion of

proceedings by the Government to obtain forfeiture of the property.

(7) If the court grants a petition under paragraph (3)—

(A) the court may enter any order necessary to ensure that the value of the property is maintained while the forfeiture action is pending, including—

(i) permitting the inspection, photographing, and inventory of the property;

(ii) fixing a bond in accordance with rule E(5) of the Supplemental Rules for Certain Admiralty and Maritime Claims; and

(iii) requiring the claimant to obtain or maintain insurance on the subject property; and

(B) the Government may place a lien against the property or file a lis pendens to ensure that the property is not transferred to another person.

(8) This subsection shall not apply if the seized property—

(A) is contraband, currency, or other monetary instrument, or electronic funds unless such currency or other monetary instrument or electronic funds constitutes the assets of a legitimate business which has been seized;

(A) is to be used as evidence of a violation of the law;

(B) by reason of design or other

characteristic, is particularly suited for use in illegal activities; or

(D) is likely to be used to commit additional criminal acts if returned to the claimant.

(g) Proportionality.—

(1) The claimant under subsection (a)(4) may petition the court to determine whether the forfeiture was constitutionally excessive.

(2) In making this determination, the court shall compare the forfeiture to the gravity of the offense giving rise to the forfeiture.

(3) The claimant shall have the burden of establishing that the forfeiture is grossly disproportional by a preponderance of the evidence at a hearing conducted by the court without a jury.

(4) If the court finds that the forfeiture is grossly disproportional to the offense it shall reduce or eliminate the forfeiture as necessary to avoid a violation of the Excessive Fines Clause of the Eighth Amendment of the Constitution.

(h) Civil Fine.—

(1) In any civil forfeiture proceeding under a civil forfeiture statute in which the Government prevails, if the court finds that the claimant's assertion of an interest in the property was frivolous, the court may impose a civil fine on the claimant of an amount equal to 10 percent of the value of the forfeited property, but in no event shall the fine be less than $250 or greater than $5,000.

(2) Any civil fine imposed under this subsection

shall not preclude the court from imposing sanctions under rule 11 of the Federal Rules of Civil Procedure.

(3) In addition to the limitations of section 1915 of title 28, United States Code, in no event shall a prisoner file a claim under a civil forfeiture statute or appeal a judgment in a civil action or proceeding based on a civil forfeiture statute if the prisoner has, on three or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous or malicious, unless the prisoner shows extraordinary and exceptional circumstances.

(i) Civil Forfeiture Statute Defined.— In this section, the term "civil forfeiture statute"—

(1) means any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense; and

(2) does not include—

(A) the Tariff Act of 1930 or any other provision of law codified in title 19;

(B) the Internal Revenue Code of 1986;

(C) the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.);

(D) the Trading with the Enemy Act (50 App. U.S.C. 1 et seq.) or the International Emergency Economic Powers Act (IEEPA) (50 U.S.C. 1701 et seq.); or

(E) section 1 of title VI of the Act of June 15, 1917 (40 Stat. 233; 22 U.S.C. 401).

(j) Restraining Orders; Protective Orders.—

(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of satisfactory performance bonds, create receiverships, appoint conservators, custodians, appraisers, accountants, or trustees, or take any other action to seize, secure, maintain, or preserve the availability of property subject to civil forfeiture—

(A) upon the filing of a civil forfeiture complaint alleging that the property with respect to which the order is sought is subject to civil forfeiture; or

(B) prior to the filing of such a complaint, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered.

(2) An order entered pursuant to paragraph (1)(B) shall be effective for not more than 90

days, unless extended by the court for good cause shown, or unless a complaint described in paragraph (1)(A) has been filed.

(3) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when a complaint has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought is subject to civil forfeiture and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than 10 days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

(4) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.